

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

77-1433

To be argued by
JOEL J. ZIEGLER

UNITED STATES COURT OF APPEALS
FOR THE SECOND DISTRICT

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UNITED STATES OF AMERICA, :
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Plaintiff-Appellee, :
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- against - :
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THOMAS PAUL DEXTER, :
:
Defendant-Appellant. :
-----x

Docket No. 77-1433

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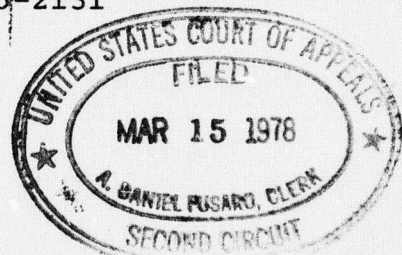
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BRIEF FOR APPELLANT
THOMAS PAUL DEXTER
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ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

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ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

1. Was appellant deprived of effective assistance of counsel, in violation of the Fourth Amendment to the Constitution of the United States, by the refusal of his attorney to permit the trial judge to charge the jury on the defense of insanity?

-1-

STATEMENT PURSUANT TO RULE 28(a)(3)

PRELIMINARY STATEMENT

This is an appeal from a judgment of the United States District Court for the Eastern District of New York (The Honorable George Pratt) rendered on Oct. 16, 1977, after a jury trial, convicting appellant THOMAS PAUL DEXTER of Attempted Bank Robbery in violation of 18 U.S.C. §2113(2).

Appellant was sentenced to a term of one month to eight years.

This Court appointed JOEL J. ZIEGLER, ESQ. as counsel on appeal, pursuant to the Criminal Justice Act.

STATEMENT OF FACTS

A. The Prosecutor's Case:

GERALDINE LONG testified that she was the manager of the Manufacturers Hanover Trust Company branch office in West Islip on November 16, 1976. Between 6:30 and 6:45 P.M. on that day she observed a man in the bank, wearing a ski mask (33-35). She heard him say, "Give me the money now". She observed him flip the glass partition that was between him and the teller. He then said, "All right, everybody down, this is a hold-up...." (35). She did not see his face, but described him as 5'10" of 11", weighing approximately 170 or

* Numbers in parenthesis refer to pages of the trial transcript.

180 lbs. (39). She got down on the floor after he ordered everyone to get down. While on the floor, she heard a loud noise, heard him say "All right, get up", and when she stood up he had already left the bank (40).

ELEANOR MC CABE testified that she was employed as the Head Teller at the subject bank (50). On the evening in question she observed a man, wearing a ski mask, approach her teller's window. He said to her, "Give me the money." She responded, "What money?" He said, "I'm not fooling, give me your money." She just stood still, in fear (53). The man had one hand inside his jacket pocket. While waiting for her to respond, "he turned around on a customer", said something to the customer, turned back toward her and hit the glass partition on the teller's counter with his hand. She then threw herself on the floor under the counter and pressed the silent alarm (54). She heard some shuffling, a banging noise, and then everything got quiet "and people ran out of the bank" (55). When she got up the man who wore the ski mask was gone (56).

JOSEPH MC HUGH testified that he is a New York City Firefighter (62). On the evening of November 19, 1976, he was in the bank to cash his pay check. He was standing at the end of a line in front of a teller's window, when he saw a man wearing a ski mask walk into the bank, walk up to a teller's cage, and he heard him say, "This is a stickup, give me your money". The man had his hand in his jacket (63). Someone

said, "Everybody get down on the floor." He crouched down. Then the man in the ski mask came over to him and said, "Make a move and I'll blow your brains out." The man then went back to the teller's booth, took his hand out of his jacket and hit the glass partition. The partition flew up in the air, hit him, and crashed to the floor, breaking into pieces (66-67).

The man again demanded money, but Mrs. McCabe was already on the floor, so he turned to the witness and asked for his money. McHugh said, "I don't have any money, get the bank's money." The man went back to the teller's cage and kicked the door leading to the teller's area. He kicked the door forcefully, making a loud noise, but it did not open (68).

The man then turned and ran out of the bank. McHugh and another customer ran after him into the parking lot. They cornered him, McHugh tripped him and came down on top of him (69). In a matter of seconds the other customer was on top of him too. They pinned his arms down and searched him for weapons. No weapon was found. He then removed the man's ski mask and a blonde wig. He then turned the man over to a policeman who had arrived on the scene (72).

McHugh added that he could not identify the defendant as the person he apprehended in the parking lot because it was too dark to get a good look at his face (73-74).

LARS MORD was another customer in the bank on the evening of November 19, 1976. He testified to substantially the same details concerning the actions of the masked man in

the bank (84-87). When the man ran out of the bank he saw McHugh run after him, so he joined the chase (88). He described how he and McHugh apprehended the masked man in the parking lot (88-89). He also testified that he could not identify the defendant as the man who was unmasked that evening (91).

MICHAEL HURLEY testified that he is a Suffolk County Police officer. At 6:45 P.M. on November 19, 1976, he received a report of an armed robbery in progress. Upon arrival at the bank he observed a large group of people standing on the roadside and two men were holding another man on the ground. He took the individual into custody. He identified the defendant as the person who he took into custody (104). He had known the defendant for about 15 years (109-110).

B. The Defense Case:

The defendant's attorney did not open to the jury and the defendant did not take the stand in his own defense.

The defendant's attorney offered into evidence medical records from Lakeside Hospital, Central Islip Hospital and Good Samaritan Hospital (116).

The reports indicated that the defendant was admitted to Lakeside Hospital on October 26, 1976, for evaluation of a urinary tract infection. The defendant's medical profile indicated a history of drug abuse, detoxification from heroin, and entrance into a methadone maintenance program. He also had a history of being a heavy drinker of alcohol (118). On

the first day in the hospital the defendant became violent, assaulted a nurse and a hospital guard. The police were called and he was taken to Central Islip Psychiatric Hospital for psychiatric evaluation.

He was diagnosed as having "had a schizophrenic episode and seems to be paranoid at this time" (119).

The report of Lakeside Hospital indicated that the defendant suffered a "sudden onset of hallucinations" and "was disoriented to time and place". He "talks to imaginary people. He's frightened, very restless. ...this man may become suicidal. He's in need of immediate psychiatric hospitalization" (124)

Central Islip Psychiatric Hospital's report indicated: "Admits to persecutory delusions, hallucinations about ants, and he denies any convulsions." "...Because of his excessive drinking, patient is unable to care for himself and is delusional, hallucinatory and confused" (125). He was discharged, at his request, from Central Islip on an out-patient basis on November 1, 1976. Upon leaving the hospital defendant signed a release indicating he was being discharged "against medical advice" (130).

On November 16, 1976, he was admitted to the emergency room of Good Samaritan Hospital for an acute urinary tract infection. He was discharged on November 19, 1976, the same day he allegedly attempted the bank robbery. The records indicated, "Condition on discharge good. Prognosis good."

C. Prosecution's Rebuttal:

It was stipulated by counsel that defendant was convicted of a bank larceny in 1970 (135). An instruction was given by the court that the purpose of the rebutted testimony "is to bear solely on the question of intent in the mind of the defendant at the time of the bank robbery in question here" (138).

MICHAEL BELLIZZI testified that he was employed by a coin shop on January 24, 1977, when the defendant walked in with another man, named Luis Russo (141). Russo drew a gun and took coins from the store. The two men left the store and as they did, they were apprehended by four police officers who had been waiting outside for them.

ARGUMENT

POINT I

APPELLANT WAS DEPRIVED OF ADEQUATE OR
EFFECTIVE ASSISTANCE OF COUNSEL BY THE
REFUSAL OF HIS COURT APPOINTED ATTORNEY
TO PERMIT THE COURT TO CHARGE THE JURY
ON THE DEFENSE OF INSANITY.

Prior to the commencement of the trial, appellant's court appointed attorney advised the trial judge that he intended to introduce the defendant's medical and hospital records in order to establish that he did not "knowingly and willfully" attempt to rob the bank (6).

Defense counsel undertook this strategy with the knowledge that his introduction of this defense would permit the prosecution to rebut the defense of lack of intent with evidence of a prior bank robbery conviction and a subsequent armed robbery charge (10-12, 15-16).

Defense counsel relied entirely on the medical records as a defense. He did not make an opening statement to the jury, he produced no defense witnesses, and the defendant did not testify in his own behalf.

At the conclusion of the trial the following colloquy took place:

MR. RUSSO [Assistant U.S. Attorney]: Your Honor, at this time I believe we didn't discuss the charge. The Government's charge. But in light of the testimony that has come in and the inference that I think are quite obvious from the reading of the record, I would request and the Government would move for an intoxication

and insanity charge so that the Jury will be wholly apprised of what constitutes insanity and at what point such a defense is in fact established.

There have been numerous references to schizophrenic episodes and violent schizophrenic episodes. I believe the Jury should be advised that insanity is a defense when it deprives one, right or wrong, knowledgeable of right or wrong, or the irresistible urge to commit a crime rather than a schizophrenic episode that has been testified to. I think the same will be appropriate of intoxication. There has been quite a lot of testimony in the record of acute alcohol addiction on the part of the Defendant. I think that the Government--the Jury is entitled to know what type of intoxication will constitute a defense to a criminal liability.

THE COURT: Mr. Kelly?

MR. KELLY: All I can say to that, Judge, we neither raised the defense of insanity with respect to the November 19th incident in the indictment, nor have I raised the defense of diminished capacity. We did not have any testimony from experts or psychiatrists and the like that would indicate the defense is claiming that on November 19th, the Defendant was insane or on that particular date he was too incapacitated to appreciate the nature of his crime or to conform his conduct to what the law requires. I have introduced this information about the Defendant's background because it is fairly close in time to the incident alleged in the indictment of November 19th. I think that it bears only on whether or not at the time of the crime on November 19th, he knew what he was doing and he did what he was doing willfully, in violation of the law. So I really don't think I've raised insanity or raised diminished capacity formally.

I realize that the manner in which the case has been presented that we did get close to those things.

THE COURT: The question now is what are we going to do with the question of insanity?

MR. KELLY: Yes. The question is did he do it

through accident, mistake or other innocent reason. Really that's what I'm relying on here, other than innocent reason.

THE COURT: I'll consider that over night, Gentlemen. I'll tell you before you start your summations what my charge will be in that regard.

MR. RUSSO: Your Honor, I might just add, while I certainly must agree, because of what has happened, no psychiatrists have been called, I think that may be a direct result of the Government's stipulation to the fact that these records were in fact kept in the ordinary course of business. They were indeed psychiatric records. There has been quite a bit of I think medical testimony as such that could cause--are not aware that any of the Jurors have any special knowledge and I believe to a layman, certainly a layman such as myself, in the psychiatric field, that we've gone over the line at least implicitly in suggesting that there was indeed some type of mental aberration or something that would result in a lack of criminal liability.

I believe that an instruction from the Court would be most helpful in clarifying that for the Jury.

MR. KELLY: Granted, it comes very close. As I say, I don't think it is because I haven't formally put on any expert testimony with respect to the Defendant's state of mind on November 19th. I think I have not really crossed the line. But I realize that it is a close question.

THE COURT: I assume you would object to my charging the Jury that you are not claiming insanity or diminished capacity or do I assume wrong?

MR. KELLY: Well, Your Honor, I have to be consistent. That's not what I'm claiming. My position is that I'm not raising the insanity or diminished capacity formally, I'm raising diminished capacity informally. I just want the Jury to take into their consideration the Defendant's recent history prior to November 19th, and I think if you want to charge the Jury that I'm not claiming sanity or diminished

capacity, I would have to accept that as being consistent with my position. I can't have it both ways, I don't think. (147-151)

The only evidence submitted on behalf of the defendant were medical records which described in substantial detail his "hallucinations", "disorientation" and "delusions". Nineteen days prior to the commission of the acts which constitute the basis of his conviction, the defendant was diagnosed as having "had a schizophrenic episode and seems to be paranoid at this time" (119). He was released from a psychiatric hospital on an out-patient basis, "against medical advice" (130).

All of these facts were before the jury and could have formed the basis for a finding of innocence by reason of insanity. Even the trial judge was impressed by the evidence of psychological disturbance. In sentencing the defendant, he read into the record this "rather unusual parole recommendation":

"Many of his episodes are markedly ineffectual, evidencing perhaps a desire to get caught. He has had some psychiatric care, but without good results. He has a long record of drug and alcohol abuse and at least one attempted suicide."
*** "Dexter's crime here made no sense. He was ineffectual and unarmed. Shortly before he had been confined for psychiatric reasons. If he can be straightened out, from his problems of drugs, alcohol, paranoia and vocational limits, he should be released on parole without much consideration being given to the actual offense which was committed here." (Minutes of Sentence, October 18, 1977, p. 18-19)

By failing to allow the Court to charge on the issue of insanity and by refusing to permit the jury the opportunity to pass upon this issue, defense counsel so limited the

defense that it amounted to no defense at all.

Concededly, this was a deliberate choice of strategy, but it should not be said, as it was in Bloeth v. Denno, 313 F.2d 364, cert. den. 372 U.S. 978 (2nd Cir. 1963), that defense counsel's actions were simply "poor tactics" which may not be considered lack of due process. In this case there was no evidence presented to the jury on the defendant's behalf, other than his medical records, containing the history of his recent psychiatric problems. In short, lack of intent was his only defense. The evidence was available to justify a finding of insanity. By limiting the jury to a non-psychiatric basis for determining lack of intent, the defense counsel committed a serious error which seriously prejudiced his client's chances for acquittal.

In Stem v. Turner, 370 F.2d 895 (4th Cir. 1966) the court dealt with a "fatal error" by trial counsel in the context of a generally slovenly representation. The Court said:

"The Fourth Amendment does not require perfection of the lawyer, and one slip does not necessarily invalidate the proceedings. But if it appears that the lawyer was negligent in one particular with resulting prejudice to his client's defense, judicial appraisal of his entire conduct becomes requisite. A brilliant performance in most aspects of the defense can redeem a blunder, but a fatal mistake in a context of a generally slovenly representation may require a conclusion that the quality of representation was below the minimum required by the Constitution."

In the instant case there was no otherwise brilliant defense; there was no defense save for the intro-

duction of the medical records. The failure of counsel to exploit the defendant's recent history of psychiatric illness cannot be attributed to any rational strategy. He usurped the functions of the jury by pre-judging for them that the defendant's acts were not the product of his mental illness.

At the beginning of the trial, defense counsel hoped to establish that the defendant had been drinking heavily or taking drugs on the day of the crime. He intended to tie this in with the medical records to somehow establish that the acts were not "willful or intentional" (3-6,9). In cross-examining the prosecution witnesses, however, not a single witness would say that the defendant's speech was slurred or incoherent or that his actions in any way appeared to be influenced by alcohol or narcotics. Thus, by the end of the trial, there was no evidence to support the initial defense theory. When counsel refused to allow the jury to consider the question of the defendant's sanity, he tossed away the only defense that retained any chance of success. He did this for the purpose of "consistency" stating, "I can't have it both ways, I don't think" (151).

The conclusion is inescapable that counsel failed to comprehend that there was no inconsistency in his requesting a charge on insanity. The jury did not know what his initial theory had been, since he did not make an opening statement and his cross-examination of the prosecution wit-

nesses was only on the circumstances under which the crime had occurred.

If there was any possibility at all that a jury could find the defendant innocent by reason of insanity, the trial court should have charged on the issue. A defense counsel who introduced evidence of psychiatric disturbance should not have been permitted to keep the jury from considering it.

It is well settled that there are instances of cases being so grossly bungled or mismanaged that they require the intervention of the trial judge to prevent the defendant from being deprived of the effective assistance of counsel.

MacKenna v. Ellis, 280 F.2d 592, mod. 289 F.2d 928, cert. den. 368 U.S. 877; Ellis v. State of New Jersey, 282 F.Supp. 298 (D.C.N.J. 1967); Miller v. Hudspeth, 176 F.2d 111. This is particularly so where, as in this case, there may be a fledgling or inexperienced lawyer appointed and where an unusual trial strategy is employed. Such cases require close monitoring and guidance from the trial judge.

The transcript reveals that both the trial judge and the prosecutor had reservations about permitting defense counsel to submit the case to the jury without a charge on the issue of insanity. Despite these reservations, he was permitted to remove from the jury's consideration the only issue which had any chance of success.

CONCLUSION

For the foregoing reasons, the judgment of the District Court must be reversed and a new trial ordered.

Respectfully submitted,

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Of Counsel

U.S. COURT OF APPEALS
FOR THE SECOND DISTRICT

Index No. 77-1433

UNITED STATES OF AMERICA,

against

Plaintiff
Appellee

AFFIDAVIT OF SERVICE
BY MAIL

THOMAS PAUL DEXTER

Defendant
Appellant

STATE OF NEW YORK, COUNTY OF SUFFOLK

ss.:

The undersigned being duly sworn, deposes and says:

Deponent is not a party to the action, is over 18 years of age and resides at
Northport, N.Y.

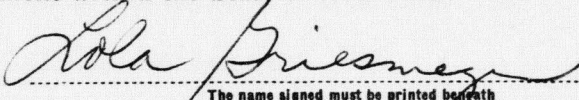
That on the 1st day of March 19 78 deponent served the annexed

Brief for Appellant
on U.S. Attorney for Eastern District of N.Y.
attorney(s) for Plaintiff, Appellee
in this action at 225 Cadman Plaza East, Brooklyn, NY 11201
the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed
in a postpaid properly addressed wrapper, in — a post office — official depository under the exclusive care
and custody of the United States post office department within the State of New York.

Sworn to before me

this 1st day of March

19 78


The name signed must be printed beneath

LOLA GRESMEYER

MARLYN M. DAVIS
NOTARY PUBLIC, State of New York
No. 52-4802624 Suffolk County
Commission Expires March 30, 1978